



TORONTO LAWYERS
ASSOCIATION

December 17, 2015

Family Rules Committee

Attn. Helena Likwornik, Committee Counsel

RE: Consultation on the Representation of Children under the Family Law Rules

To the Committee:

Thank you for seeking the input of the Toronto Lawyers' Association with respect to the serious issue of representation of children under the Family Law Rules.

We understand that there is a dichotomy of opinion regarding the interpretation of the current Rule 4 of the Family Law Rules, which was highlighted by the differing results reached by two different panels of the Divisional Court regarding the need for a child to be represented by a litigation guardian in an application for child support that had been initiated by the child.

We note that the Family Law Rules differ substantially from the Rules of Civil Procedure, and that the differences are based upon the policy objectives specific to the unique exigencies of family law proceedings.

The Rules of Civil Procedure direct that the Rules be interpreted to secure the just, most expeditious and least expensive determination of the dispute. In contrast, the primary objective of the Family Law Rules is to enable the courts to deal with cases justly, through a flexible procedure that is fair to all parties with a view to saving both time and expense. The court, the parties and lawyers are obliged to act in a manner that promotes the primary objective. There is no such prime imperative in the Civil Rules. Under the Civil Rules the concepts of "expeditious" and "least expensive" are fluidly interpreted based upon the nature of the case. The application of the Civil Rules to achieve the "least expensive" determination of the case on its merits therefore is substantially different than the mandatory obligation under the Family Law Rules to deal with cases in a manner that saves time and expense. In this regard, the TLA agrees with the observations of Nordheimer J. in *CMM v. DGC and JM*, 2015 ONSC 2447 at para.16.

Under the Rules of Civil Procedure, a minor is, without exception, deemed to be a person under a disability. As such, a minor must be represented by a court-approved, or court appointed litigation guardian, unless the court orders otherwise, and the litigation guardian must also retain a lawyer. The Rules of Civil Procedure include provisions for the appointment of the Children's Lawyer or Public Guardian and Trustee if no other appropriate litigation guardian is available. The perceived

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need for an adult representative and legal representation flows from the classification of a child as a person under a disability, and therefore both vulnerable and incapable of making a legally binding decision. The Civil Rules add layers of complexity which can add delay and expense to a proceeding.

However, the Family Law Rules permit any party to act in person, or be represented by a person who is not a lawyer, as well as permitting representation by a lawyer. There is no exception for a child who is a party to the proceeding and no implicit conclusion that a child is incapable of making competent decisions in respect of matters that affect him or her. The Family Law Rules are devoid of reference to a "litigation guardian" and do not provide any of the elaborate process dictated under the Civil Rules for the appointment of a litigation guardian for children who are parties to a family law proceeding.

Instead, Rule 4(2) allows the court to permit any willing person appropriate to the task to represent a special party. This Rule is discretionary and permissive. It is intended to allow the court to respond flexibly and in a cost effective manner when a litigant is in need of representation before the court.

It is the view of the TLA that if any revision is to be made to Rule 4 of the Family Law Rules, it should be a light touch. The court is in the best position to assess whether any child litigant is in need of a representative to assist the child in negotiating their way through the legal system. A child who is a party to a custody, access, child protection, adoption or child support case should be entitled to the benefits that flow from being found to be a special party (i.e. representation by the Children's Lawyer, if the Children's Lawyer consents); but children who are parties to these proceedings should not automatically be deemed to be a special party, nor should they be compelled to retain legal counsel. Each case should be independently assessed based on the particular circumstances of the child litigant. However, any person who is mentally incapable should always be required to have a representative in court proceedings. Accordingly the TLA recommends that the definition of special party be revised so that it is clear that a child to one of the enumerated proceedings may be found by the court to be a special party, if warranted. Such a definition could be:

"special party" means a party who is or appears to be mentally incapable for the purposes of the *Substitute Decisions Act, 1992* in respect of an issue in the case and who, as a result, requires representation in respect of court proceedings, or a party who is a child, but does not include a child in a custody, access, child protection, adoption or child support case unless the court finds the child requires representation."

It is the opinion of the TLA that there is no demonstrated need or policy basis supporting an inflexible rule requiring either a litigation guardian or legal representation for all children who are litigants under the Family Law Rules. These Rules, and the powers of the court are sufficiently broad and flexible to ensure that children's interests are protected without adding cumbersome and expensive extra layers to the litigation process. Adding such requirements would be antithetical to the primary objective of the Family Law Rules. The purpose of the Family Law Rules, and the issues addressed in family law proceeding are quite different than the Civil Rules and civil actions.

We trust that you find these submissions helpful in your deliberations. Should you wish any clarification or further input, we are at your disposal.

Yours very truly,

A handwritten signature in blue ink, appearing to read 'M. Waddell', written in a cursive style.

Margaret L. Waddell, Assistant Secretary and Advocacy Committee Chair
Toronto Lawyers Association